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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 560

HAYES L. COMBS,

Appellant,

vs.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

MYRON G. EHRLICH,
Counsel for Appellant.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4576-51

HAYES L. COMBS,

Plaintiff,

vs.

JOHN W. SNYDER, SECRETARY OF THE TREASURY; JOHN B. DUNLAP, COMMISSIONER OF INTERNAL REVENUE; AND GEORGE HOFFERBERT, COLLECTOR OF INTERNAL REVENUE FOR BALTIMORE, MARYLAND,

Defendants

STATEMENT OF JURISDICTION

In accordance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellant files herewith his statement upon which he bases his allegation that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein, pursuant to Rule 12, Paragraph 1, to said Court:

1. This is an action brought in the United States District Court for the District of Columbia to enjoin the defendants from administering, operating, executing, and enforcing Chapter 27a of the Revenue Act of 1951 against plaintiff;

and or to enter judgment directing defendants to issue to him a special tax stamp provided for in Chapter 27a of said Revenue Act, without requiring plaintiff to answer certain questions the answers to which will tend to incriminate him; and/or for an injunction enjoining the defendants from publishing, divulging, or in any manner disclosing to anyone the nature, contents, or any information acquired from plaintiff by his attempted compliance with Chapter 27a of said Revenue Act.

The Complaint alleges that Chapter 27a of the Revenue Act of 1951 is unconstitutional. A statutory, three-judge court was convened pursuant to Title 28, U. S. C., Sec. 2282, which Court considered said complaint and motion to dismiss filed herein, and on November 29, 1951, the said Court entered an order holding that Chapter 27a of the Revenue Act of 1951 was constitutional, and denied plaintiff's motions for preliminary injunctions, and dismissed his complaint.

Statutory Provision Sustaining Jurisdiction

The statute believed to sustain appellate jurisdiction herein is 28 U. S. C. Sec. 1253, which provides:

> "Sec. 1253. Direct appeals from decisions of three-judge courts.
>
> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

Statute Involved

2. The statute of the United States, the validity of which is involved in this appeal, is Chapter 27a of the Revenue

Act of 1951, Chapter 521—Public Law 183, which provides as follows:

"CHAPTER 27A—WAGERING TAXES

"Subchapter A—Tax on Wagers

"Sec. 3285. Tax.

"(a) Wagers.—There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

"(b) Definitions.—For the purposes of this chapter—

"(1) The term 'wager' means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

"(2) The term 'lottery' includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

"(c) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

"(d) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

"(e) Exclusions from tax.—No tax shall be imposed by this subchapter (1) on any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 3267.

"(f) Territorial extent.—The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

"Sec. 3286. Credits and Refunds.

"(a) No overpayment of tax under this subchapter shall be credited or refunded (otherwise than under subsection (b)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Secretary, (1) that he has not collected (whether as a separate charge or otherwise) the amount of the tax from the person who placed the wager on which the tax was imposed, or (2) that he has repaid the amount of the tax to the person who placed such wager, or unless he files with the Secretary written consent of the person who placed such wager to the allowance of the credit or the making of the refund. In the case of any laid-off wager, no overpayment of tax under this subchapter shall be so credited or refunded to the person with whom such laid-off wager was placed unless

he establishes, in accordance with regulations prescribed by the Secretary, that the provisions of the preceding sentence have been complied with both with respect to the person who placed the laid-off wager with him and with respect to the person who placed the original wager.

"(b) Where any taxpayer lays off part or all of a wager with another person who is liable for tax under this subchapter on the amount so laid off, a credit against the tax imposed by this subchapter shall be allowed, or a refund shall be made to, the taxpayer laying off such amount. Such credit or refund shall be in an amount which bears the same ratio to the amount of tax which such taxpayer paid under this subchapter on the original wager as the amount so laid off bears to the amount of the original wager. Credit or refund under this subsection shall be allowed or made only in accordance with regulations prescribed by the Secretary; and no interest shall be allowed with respect to any amount so credited or refunded.'

"Sec. 3287. Certain provisions made applicable.

"All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax imposed by this subchapter. In addition to all other records required pursuant to section 2709, each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable.'

"Subchapter B—Occupational Tax

"Sec. 3290. Tax.

"A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

"Sec. 3291. Registration.

"(a) Each person required to pay a special tax under this subchapter shall register with the collector of the district—

"(1) his name and place of residence;

"(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

"(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

"(b) Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

"(c) In accordance with regulations prescribed by the Secretary, the collector may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

"Sec. 3292. Certain provisions made applicable.

"Sections 3271, 3273(a), 3275, 3276, 3277, 3279, and 3280 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation described in chapter 27. No other provision of subchapter B of chapter 27 shall so extend or apply.

"Sec. 3293. Posting.

"Every person liable for special tax under this subchapter shall place and keep conspicuously in his prin-

cipal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue.

"Sec. 3294. Penalties.

"(a) Failure to pay tax.—Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

"(b) Failure to post or exhibit stamp.—Any person who, through negligence, fails to comply with section 3293, shall be liable to a penalty of $50, and the cost of prosecution. Any person who, through willful neglect or refusal, fails to comply with section 3293, shall be liable to a penalty of $100, and the cost of prosecution.

"(c) Willful violations.—The penalties prescribed by section 2707 with respect to the tax imposed by section 2700 shall apply with respect to the tax imposed by this subchapter.

"Subchapter C—Miscellaneous Provisions

"Sec. 3297. Applicability of Federal and State Laws.

"The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

"Sec. 3298. Inspection of Books.

"Notwithstanding section 3631, the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter."

(b) Technical amendment.—Section 3310(f) (relating to discretion allowed the Commissioner with respect to returns and payment of tax)[53] is hereby amended by inserting after "subchapter A of chapter 25," the following: "subchapter A of chapter 27A,".

SEC. 472. EFFECTIVE DATE OF PART VII

The tax imposed by subchapter A of chapter 27A, as added by section 471, shall apply only with respect to wagers placed on or after the first day of the first month which begins more than 10 days after the date of enactment of this Act. No tax shall be payable under subchapter B of chapter 27A, as added by section 471, with respect to any period prior to the first day of the first month which begins more than 10 days after the date of enactment of this Act. In the case of any person who is liable for tax under subchapter A of chapter 27A, as added by section 471, or who is engaged in receiving wagers for or on behalf of any person so liable, and who commenced the activity which makes him subject to such tax, or who was engaged in receiving such wagers, prior to the first day of the first month specified in the preceding sentence, the tax under subchapter B of chapter 27A, as added by section 471, shall be reckoned proportionately from the first day of such month to and including the thirtieth day of June following and shall be due on, and payable on or before, the last day of the month specified in the preceding sentence."

Date of Judgment and of Petition for Appeal

3. The judgment appealed from was entered in the United States District Court for the District of Columbia on November 29, 1951, as appears from copy of opinion and order attached hereto as Appendix A.

4. The petition for appeal was presented for approval on December 28, 1951.

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[53] 26 U.S.C.A. § 3310(f).

Substantial Nature of the Questions Involved and Showing of Abuse of Discretion in Denying Interlocutory Injunctions.

5. This appeal is based upon the judgment of the United States District Court for the District of Columbia, which denied plaintiff's motions for preliminary injunctions, and held Chapter 27a of the Revenue Act of 1951 to be constitutional as appears from the opinion and order attached hereto and prayed to be read as part hereof.

The amended complaint is in three counts. Count One alleges that defendants are charged with the administration, operation, execution, and enforcement of the Revenue Act of 1951. That plaintiff is desirous of engaging in the business and occupation covered by Chapter 27a of said Revenue Act, but said act makes it mandatory for plaintiff to secure from defendants a special occupational tax stamp prior to engaging in said business and occupation, as provided in Sections 3290, 3291, and 3293 hereinbefore set forth. That on October 31, 1951, pursuant to said Chapter 27A, plaintiff filed an application for the special tax stamp on the form provided by defendants, and remitted the required payment of $50 with his application. That he also submitted a letter explaining that he failed to answer questions 3, regarding the place of the business, and questions 5, 6, and 7, as required by the application and Revenue act, because the answers to said questions might tend to incriminate him of a violation of the laws of the United States, (particularly the gambling sections of Title 22 of the D. C. Code and the Federal Lottery Statutes, Title 18, U. S. C., Sec. 1301, 1302, which were heretofore enacted by the Congress of the United States). That on November 20, 1951, defendants notified plaintiff that he did not complete the application as required, and they would issue the said tax stamp when he answered the questions

omitted. That he was informed that the said special tax stamp would not be issued because he failed to answer the questions as heretofore enumerated. That even if he were issued the special tax stamp provided for by Chapter 27a, Section 3285 of the Revenue Act, there is imposed on wagers which may have been received by plaintiff in November, 1951, or which may be received by him thereafter, a purported excise tax equal to 10 per centum of the amount thereof, which purported tax he would be required to pay on or before the 30th day of November, and on or before the 30th day of each and every month thereafter.

That there is a probability that immediate and irreparable injury and damage will result to plaintiff if defendants administer, operate, execute, and enforce Chapter 27a of the said Revenue Act against him, in that he will be subjected to and will suffer pains and penalties, criminal and civil. That the imposition of the alleged excise taxes, as set forth in Chapter 27a, are really penalties imposed upon plaintiff as punishment for alleged criminal acts, and that said chapter relies on the criminal conduct of plaintiff and is a criminal sanction against him. That unless defendants are restrained and enjoined from administering, operating, executing, and enforcing Chapter 27a, plaintiff will suffer pains and penalties, criminal and civil, and will suffer immediate and irreparable injury and damage. That Chapter 27a of the Revenue Act of 1951 is unconstitutional, in that it clearly involves the idea of punishment for infraction of the laws—the definite function only of a penalty—and the taxes provided for in Chapter 27a are conditioned only upon the commission of a crime by the plaintiff, in violation of the laws of the United States as more particularized, supra.

That plaintiff has no plain, adequate, and complete remedy at law. Plaintiff prayed that a three-judge court be ordered to hear and determine the constitutionality of

Chapter 27a of the Revenue Act of 1951. That Chapter 27a of said Revenue Act be declared unconstitutional; and that an order, pendente lite and permanently, be issued restraining and enjoining the defendants, their agents, servants, and employees from administering, operating, executing, and enforcing Chapter 27a of the Revenue Act of 1951 against him, and for such other and further relief as the Court may deem just and proper.

Count Two prays that defendants be directed to issue to plaintiff the special tax stamp hereinbefore referred to, without requiring him to answer Question 3, with reference to the place of his business, and Questions 5, 6, and 7 of the application and required by the Revenue Act, because the answers to such questions might tend to incriminate him of violations of said laws of the United States, set forth above.

Count Three prays that the court specifically determine the constitutionality of Sections 3275, 3291, and 3293, and Chapter 27a of the Revenue Act. It also seeks to enjoin defendants from requiring plaintiff to comply with so much of Section 3291 as requires him to answer that part of Question 3 in regard to his place of business; and Questions 5, 6, and 7 in the application and required by the Revenue Act, for the special tax stamp; further, to enjoin defendants from requiring plaintiff to comply with Section 3293 and to enjoin defendants from publishing, divulging, or in any manner disclosing to anyone the nature, contents, or any information acquired from the plaintiff by his attempted compliance with Chapter 27a of said Revenue Act.

To the Complaint the defendants filed a Motion to Dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted.

The grounds upon which it is contended that the questions involved herein are substantial and that the rulings

of the Court below were such as to bring the case within the jurisdiction provisions relied upon herein, are:

Chapter 27a of the Revenue Act of 1951 is unconstitutional in that its provisions impose penalties upon the plaintiff in the guise of taxes. Article 1, Section 8 of the United States Constitution confers upon the Congress power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

It cannot be contended that the taxing provision grants the Congress power to impose penalties in the guise of excise tax legislation. It must be remembered that the power of Congress to lay taxes is not a general power. It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the assertion of powers which are granted. Congress cannot pass penalty statutes under the pretext of executing its taxing powers, and resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, and which is obviously unconstitutional.

It is apparent that Chapter 27a of the Revenue Act of 1951 is unconstitutional when it is considered that previous acts of the Congress penalize the occupation and business covered by said chapter and the alleged excise taxes imposed are an additional penalty on such illegal activity.

The previous acts of Congress which penalize the occupations and businesses covered by Chapter 27a are:

> "§ 22-1501 [6:151]. (D.C. Code, 1940 Ed.) Lotteries-Promotion-Sale or possession of tickets.
>
> If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any

policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 1.)"

"§ 22-1502 [6:151a]. (D.C. Code, 1940 Ed.) Possession of lottery or policy tickets.

If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devise, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both. (Apr. 5, 1938, 52 Stat. 198, ch. 72, § 2.)"

"§ 22-1503 [6:152]. (D.C. Code, 1940 Ed.) Permitting sale of lottery tickets on premises.

If any person shall knowingly permit, on any premises under his control in the District, the sale of any chance or ticket in or share of a ticket in any lottery or policy lottery, or shall knowingly permit any lottery or policy lottery, or policy shop on such premises, he shall be fined not less than fifty dollars nor more than five hundred dollars, or be imprisoned not more than one year, or both. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, § 864.)"

"§ 22-1504 [6:153]. (D.C. Code, 1940 Ed.) Gaming—Setting up gaming table—Inducing play.

Whoever shall in the District * * * induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than five years. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 865.)"

"§ 22-1505 [6:154]. (D.C. Code, 1940 Ed.) Permitting gaming table or device to be set up.

Whoever in the District knowingly permits any gaming table, bank, or device to be set up or used for the purpose of gaming in any house, building, vessel, shed, booth, shelter, lot, or other premises to him belonging or by him occupied, or of which at the time he has possession or control, shall be punished by imprisonment in the jail for not more than one year or by a fine not exceeding five hundred dollars of both. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 866.)"

"§ 22-1501 [6:156]. (D.C. Code, 1940 Ed.) 'Gaming table' defined.

All games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within the meaning of sections 22-1504 to 22-1506; and the courts shall construe said

sections liberally, so as to prevent the mischief intended to be guarded against. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 868.)"

"§ 22-1508 [6:157]. (D.C. Code, 1940 Ed.) Gambling pools and book making.

It shall be unlawful for any person or association of persons to bet, gamble, or make books or pools on the result of any trotting or running race of horses, or boat race, or race of any kind, or in any election, or any contest of any kind, or game of baseball. Any person or association of persons violating the provisions of this section shall be fined not exceeding five hundred dollars or be imprisoned not more than ninety days, or both. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 869; May 16, 1908, 35 Stat. 164, ch. 172, § s.)"

"Title 18—U. S. Code.

§1301. Improving or transporting lottery tickets.

Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift, enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both."

"Title 18—U. S. Code.

~~§ 1302. Mailing lottery~~ tickets or related matter.

Whoever knowingly deposits in the mail, or sends or delivers by mail;

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes—

Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years."

In the case of *Lipke* v. *Lederer*, 259 U. S. 557, the Supreme Court of the United States held that the so-called taxes imposed by Section 35 of the National Prohibition Act upon dealings in liquor, prohibited and made criminal by said Act were, in reality, a penalty. The Court stated the mere use of the word "tax" in an act primarily designed to define and suppress crime, is not enough to show that within the true intendment of the term, a tax was laid. It further held that "when, by its very nature, the imposition is a penalty, it must be so regarded * * * evi-

dence of crime is essential to assessment under Section 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the Government' and clearly involved the idea of punishment for infraction of the law—the definite function of a penalty. *O'Sullivan* v. *Felix*, 233 U.S. 318, 324."

It is submitted that before plaintiff can be liable for the taxes imposed by Chapter 27a of the Revenue Act of 1951, the defendants, in order to assess the tax imposed, must first show that the plaintiff has committed a crime in violation of the laws of the United States, as heretofore set forth. The situation in this case is exactly like that in *Lipke* v. *Lederer*, supra. Further indication that the provisions of Chapter 27a are intended as a penalty rather than a tax is made apparent from the incorporation into said chapter of Sections 3275, 3291 and 3293 thereof.

The Supreme Court of the United States has recently again adopted the holding that a penalty cannot be imposed in the guise of a tax in the case of *United States* v. *Sanchez*, 340 U. S. 42. It was held in that case that the transfer tax imposed by the Marihuana Tax Act of 1950 on the transfer of marihuana was a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect, because the tax liability under that Act does not in effect rest on criminal conduct and can be properly called a civil rather than a criminal sanction and further that the tax was not conditioned upon the commission of a crime, and the transfer on which the tax was laid was not made an unlawful act under the statute. It can be readily concluded from the language of the Supreme Court that if the transfer of marihuana was made a crime, the statute taxing said transfer would be unconstitutional because it would involve the imposition of a penalty in the guise of a tax.

It is submitted that the case at bar cannot be distinguished from the doctrine heretofore enunciated by the Supreme Court of the United States in *Lipke* v. *Lederer, supra,* and *United States* v. *Sanchez, supra,* because the plaintiff who is liable for the tax is a person who is engaged or contemplates engaging in conduct prohibited and made punishable by other penal statutes of the United States, hereinbefore set forth. Chapter 27a of the Revenue Act of 1951 clearly involves the idea of punishment for infraction of the law and is unconstitutional.

The opinion of the District Court in this case held that the constitutional questions the plaintiff raised were substantial enough to give that three-judge court jurisdiction and further stated that Chapter 27a of the Revenue Act of 1951 is constitutional. The opinion further states that plaintiff was seeking the intervention of the court for the protection of a criminal business and that said court would deny him that protection because he did not come into Court with clean hands and for that reason refused plaintiff's motion for preliminary injunctions.

It is earnestly contended that the Court was in error and that the doctrine of unclean hands is not applicable and should not prohibit the granting of the relief requested. It is further contended that the lower Court abused its discretion in denying plaintiff's motion for preliminary injunctions and granting defendant's motion to dismiss the complaint.

No relief is sought with respect to those acts of Congress which make the offenses criminal for which the alleged tax is imposed. The plaintiff continues to be subject to the imposition of criminal sanctions provided by such statutes even though Chapter 27a is declared to be unconstitutional. The plaintiff merely requests a determination as to whether or not he is subject to the alleged taxes

imposed by Chapter 27a if he engages in the business or occupation covered by that chapter.

As held by the Supreme Court of the United States in *Allen* v. *Regents of the University System of Georgia*, 304 U. S. 439, the plaintiff is entitled to have a determination of the question as to whether he is subject to the tax imposed by the said chapter. He is not bound to subject himself to pains and penalties, criminal and civil, in order to have this question settled if the alleged tax is in truth the imposition of a penalty and a criminal sanction. The plaintiff in good faith believes that an unconstitutional burden is attempted to be placed upon his transactions in the business and occupation covered by the chapter and is entitled to the relief prayed for. The statute exposes plaintiff to the risk of grave criminal penalties and he is entitled to know whether or not he should properly be so exposed.

The plaintiff has no plain, adequate and complete remedy at law because the payment of an assessment of the tax under protest would still subject him to criminal penalties and Chapter 27a contravenes the 5th Amendment because the evidence required to be given by him in connection with such protest can be used in evidence against him for violations of other laws of the United States heretofore set forth.

See Treasury Regulations:

> Under Treasury Decision 4929, Page 96 of the Internal Revenue Cumulative Bulletin, the following general provision says:
>
> "Section 463C.32, *Treasury Department officers and Employees.*—The officers and employees of the Treasury Department whose official duties require inspection of returns may inspect any such returns without making a special written application. If the head of a bureau or office in the Treasury Department, not a part of the Internal Revenue Bureau, desires to inspect

or to have an employee of his bureau or office inspect a return in connection with some matter officially before him for information other than tax purposes, the inspection may, in the discretion of the Secretary, be permitted upon written application to him by the head of such bureau or office, showing in detail why the inspection is desired."

"Section 4630.33. *Inspection by Branch of Government Other Than Treasury Department.*— Except as provided in Section 4630.34, if the head of an executive department (other than the Treasury Department), or of any other establishment of the United States Government desires to inspect or to have some other official or employee of his branch of the service inspect a return in connection with some matter officially before him, the inspection may, in the discretion of the Secretary of the Treasury, be permitted upon written application to him by the head of such executive department or other government establishment. The application shall be signed by such head and shall show in detail why the inspection is desired, the name and address of the taxpayer who made the return, and the name and official designation of the person who is desired to inspect the return. *The information obtained under this section and Section 4630.32 may be used as evidence in any proceeding conducted by or before any department or establishment of the United States, or to which the United States is a party.*" (Italics supplied.)

"Section 463.34. *Inspection by Government Attorneys.*—Any return shall be opened to inspection by a United States Attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for inspection shall be in writing and, except as provided in Section 4630.37, shall be addressed to the Commissioner and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant to the Attorney General, an Assistant Attorney General, or a United States Attorney."

Under Treasury Decision 5138, the following regulation governing the inspection of income tax returns was adopted: Internal Revenue Cumulative Bulletin, 1942-17-11074, Page 99 says:

"Section 458.611. *Inspection of Excise Tax Returns.*—Pursuant to the above-mentioned provisions of law, excise tax returns filed with respect to any tax imposed by Chapters 7 or 12 or 21, of Subchapter A of Chapter 29 or Chapter 30 of the Internal Revenue Code, or filed after June 16, 1933 with respect to any tax imposed by Title IV, V, or VII of the Revenue Act of 1932, or filed with respect to the tax imposed by Title IV of the Revenue Act of 1934, or by any of the above-mentioned provisions as amended, shall be open to inspection to the same extent as provided with respect to tax returns in Subpart B, and Sections 463(.31, 463(.32, 463(.33(a), 463(.34, 463(.35, 463(.36 and 463.37 of Subpart D of Treasury Decision 4929, approved August 28, 1939 [C. B. 1939-2, 911], as amended by Treasury Decision 4991, approved July 20, 1940 [C. B. 1940-2, 92] [26 C. F. R. 1939 Sup., 458.301 to 458.307, inclusive; 458.33 to 458.337, inclusive, 1940 sup. 458.333(a)]."

See also Title 26 § 3275 U. S. Code.

"§ 3275. List of special taxpayers for public inspection.

(a) In collector's office. Each collector shall, under regulations of the Commissioner, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality, he shall furnish a certified copy thereof, as of a public record, for which a fee of $1 for each one hundred words or fraction thereof in the copy or copies so requested, may be charged."

The Supreme Court has expressed itself on this proposition in *White* v. *United States*, 322 U. S. 694, 698:

> "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. *It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him.* Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. *The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime.* While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution. *It protects the individual from any disclosure*, in the form of oral testimony, documents or chattels, *sought by legal process* against him as a witness. (Italics supplied.)

If plaintiff does not pay the tax which may be assessed against him under Chapter 27a he is subject to criminal penalties for failure to so pay.

It is submitted that the cases of *Lipke* v. *Lederer*, and *Allen* v. *Regents*, supra, are sufficient authority for the Supreme Court to order the granting of the relief sought in the complaint. It could just as readily be suggested that the plaintiffs in those cases had unclean hands and it

is contended that the doctrine of unclean hands does not and should not apply because Chapter 27a is unconstitutional on its face.

Chapter 27a is unconstitutional on its face inasmuch as this Court must take judicial notice of those acts of Congress which penalize the occupation and business sought to be taxed in said chapter. These acts are Federal statutes and are on an even plane with Chapter 27a. This has been determined heretofore in the case of *Arnstein* v. *United States*, 54 App. D. C. 199, 296 F. 946, Cert. Den. 264 U. S. 595, in which the Court said:

> "We have decided that a crime against the United States is committed by any person who violates either Section 818 or Section 858 of the District Code. *Fletcher* v. *United States*, 42 App. D. C. 53. See, also, *Thomas* v. *United States*, 156 Fed. 897, 84 CCA 477. Since it is a crime against the United States to violate those sections, we see no reason for saying that it is not a crime against the United States to violate other sections of the same Code."

The lower court in the instant case erred in holding that relief should be denied because of the doctrine of unclean hands. The question of unclean hands has no relation to the determination by a constitutional court of a constitutional question. The only question involved is whether prosecution is threatened, in which event the court will decide the constitutional question where extraordinary circumstances are involved and not compel the plaintiff to incur drastic penalties attached to the violation of the statute. It is submitted that the circumstances in this case are extraordinary as set forth heretofore. See *Ackerman* v. *International Longshoreman's Union*, 187 F. (2d) 867. See also *Toomer* v. *Witsell*, 334 U. S. 385, 393, wherein the Court stated:

> "Some of the individual appellants had previously been convicted of shrimping out of season and in inland waters. The District Court held that this previous misconduct, not having any relation to the constitutionality of the challenged statutes, did not call for application of the clean hands maxim. We agree."

It was pointed out in Ex Parte Young, 209 U. S. 123, that even as to individuals, equity grants relief from compliance with a statute attacked as unconstitutional where the penalties attached to testing the statute in any other way are so severe as to make such tests otherwise practically impossible. See also *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 82.

In *Stafford* v. *Wallace*, 258 U. S. 495, 512, the Court said:

> "In each bill the averments are sufficient if the act be invalid, to show equitable grounds for injunction in the severe penalties incurred for failure to comply with the act *before opportunity can be given to test its* validity."

It will, of course, consume sometime for a test case to reach the Supreme Court if such case resulted from the arrest of an individual for failure to comply with Chapter 27a. The magnitude of the penalties, including possible imprisonment, which would have accumulated in such a period would make the risk an impossible one.

Conclusion

This appeal is within the exclusive jurisdiction of the Supreme Court and presents substantial questions of the greatest importance requiring review of the order of the three-judge court which recognized the substantial nature of the questions in its opinion.

Respectfully submitted,

Myron G. Ehrlich,
Attorney for Plaintiff.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Holding a Three-Judge Court

Civil Action No. 4576-51

HAYES L. COMBS, *Plaintiff*,

vs.

JOHN W. SNYDER, et al., *Defendants*

OPINION

The plaintiff seeks an injunction to restrain enforcement of Chapter 27A of the Internal Revenue Code, enacted October 20, 1951 by Public Law No. 183, Sec. 471, 82nd Cong., 1st Sess. This Chapter imposes a 10 per cent excise tax on wagers, as defined, and an occupational stamp tax of $50 a year on persons liable for the excise tax. It requires such persons to register their names, residences, and places of business; and the names and residences of persons who receive wagers for them or for whom they receive wagers. Violation of the Act exposes the violator to criminal penalties.

The plaintiff's complaint states in substance that he desires to engage in the business covered by the Act. It states that he has tendered $50 and applied for the stamp which would evidence his compliance with the Act. The stamp has not been issued because he has declined to make some of the required disclosures. His complaint alleges that these disclosures, if made, would expose him to criminal penalties. It also alleges that the Act is unconstitutional.

We think some of the constitutional questions the plaintiff asks us to decide are substantial enough to give this three-judge court jurisdiction. We think the Act constitutional. But we think it unnecessary to discuss the constitutional questions in the circumstances of this case. The com-

plaint clearly implies and plaintiff's counsel conceded in oral argument, that what plaintiff seeks is the intervention of the court for the protection of a criminal business. Nothing is better settled than that it is within the discretion of a court of equity to deny its aid to one who does not come into court with clean hands. Few things are clearer than that one who comes seeking protection for conduct that he concedes to be criminal has unclean hands within the meaning of this principle. The plaintiff's motion for a preliminary injunction is therefore denied and the defendants' motion to dismiss the complaint is granted.

HENRY W. EDGERTON,
United States Circuit Judge;
ROBERT N. WILKIN,
United States District Judge;
LUTHER W. YOUNGDAHL,
United States District Judge.

November 29, 1951.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4576-51

HAYES L. COMBS, *Plaintiff.*

vs.

JOHN W. SNYDER, et als., *Defendants*

ORDER

This cause having come on to be heard before a court of three judges pursuant to the provisions of Section 2284 of Title 28 upon plaintiff's motion for a preliminary injunction and defendants' motion to dismiss, and it appearing to the Court that it has jurisdiction of the subject matter; and it further appearing that Chapter 27 (a) of the Revenue Act of 1951 and Sec. 3275 of Title 26, U. S. C. are constitutional, but it further appearing to the Court that this plaintff seeks the aid of equity for the protection of an illegal enterprise,

and that, therefore, the complaint fails to state a claim upon which relief may be granted, it is by the Court this — day of November, 1951,

Ordered that plaintiff's motion for a preliminary injunction be, and the same is hereby, denied; and it is

Further Ordered that defendants' motion to dismiss be, and the same hereby is, granted.

HENRY W. EDGERTON,
Judge,
United States Court of Appeals for the District of Columbia Circuit;

LUTHER W. YOUNGDAHL,
Judge,
United States District Court for the District of Columbia;

ROBERT N. WILKIN,
Ret.,
District Court Judge, Sixth Circuit.